

MEASURES AGAINST PROFIT DEFERRAL THOUGHT OFFSHORE COMPANY*

*Suthatip Sridetprasart***

ABSTRACT

In the globalization, international business transactions have been increasing rapidly over the years. This is the reason why the world economy has become increasingly integrated. Trade flows have grown as a proportion of national income, global capital market and investments have expanded in many states. These international business activities have led to the formation of groups of companies with mutual interests.

Generally, the goal of business enterprise is to create profit. In practice, most companies make profit by business expansion as well as in many other ways, such as it can be enhanced through transfer pricing using a foreign company. Profits that arise in the company are generally not taxed in the shareholder's country until the shareholder receives dividends or disposes of the shares in the foreign company, implying that taxation in the shareholder's residence state is deferred. This is beneficial to the extent that the foreign tax payable is lower than the residence state's tax. Thus, the tax deferral encourages residents to remove income to low tax jurisdictions and to accumulate such income there instead of repatriating the dividends to the residence state.

Currently, since Thailand is a source income country and needs capital inflow and high technologies, MNEs have influenced the development of Thailand through their investments. The problems of tax deferral and tax base erosion have existed because it is difficult to transparently identify the matter due to a lack of information and the nature of trans-border business transactions of MNEs. All the information and documentation are also often kept in the parent company established in other countries.

Thailand is also facing the problem of international tax planning or tax avoidance by MNEs based in Thailand and abroad. Moreover, Thailand has not had any protection measures in Thai Revenue Code that would enable the authorities to prevent or respond effectively to such international tax planning. Therefore, the "Controlled Foreign Company" measures should be used for preventing international tax avoidance in Thailand.

Keywords: Taxation, Controlled Foreign Company, Tax Deferral, Tax Base Erosion, Tax Avoidance, Multinational Company, Offshore Company

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** Graduate Student of Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University.

ในปัจจุบัน การค้าและการลงทุนระหว่างประเทศได้ขยายตัวอย่างกว้างขวางสำหรับประเทศไทย และด้วยเหตุผลนี้ จึงมีนักลงทุนไทยจำนวนมากได้ขยายการลงทุนไปยังประเทศต่างๆ เช่น ประเทศสิงคโปร์ ประเทศจีน และประเทศเวียดนาม ทั้งนี้เหตุผลของการเข้าไปลงทุนในต่างประเทศนั้นมีอยู่หลายสาเหตุด้วยกัน เช่น ประเทศที่เข้าไปลงทุนมีค่าจ้างแรงงานถูก หรือทรัพยากรธรรมชาติมาก และที่สำคัญที่สุดคือประเทศที่เข้าไปลงทุนจัดเก็บภาษีในอัตราต่ำ หรือ มีลักษณะเป็นดินแดนปลอดภาษี หรือที่เรียกว่า Tax Haven Country

โดยผู้เขียนเห็นว่า ปัญหาที่เกิดขึ้นในขณะนี้คือ กรณีที่บริษัทแม่ในประเทศไทยได้มีการเข้าไปลงทุนอย่างแท้จริงในประเทศที่มีลักษณะเป็นดินแดนปลอดภาษี แต่บริษัทแม่ในประเทศไทยกลับไปจัดตั้งบริษัทในประเทศดินแดนปลอดภาษีเพื่อใช้บริษัทที่ตั้งขึ้นมาเหล่านั้นเป็นผู้ดำเนินการลงทุนแทนบริษัทแม่ ในประเทศไทย โดยมีวัตถุประสงค์หลักเพื่อที่จะดำเนินการโยกย้ายถ่ายเทเงินได้หรือผลกำไรจากการเข้าไปลงทุนในต่างประเทศให้เป็นเงินได้ของบริษัทที่ตั้งอยู่ในประเทศดินแดนปลอดภาษีก่อน ซึ่งทำให้บริษัทแม่ ในประเทศไทยไม่ต้องเสียภาษีจากเงินได้ดังกล่าวในประเทศไทยเพราะผู้มีเงินได้จริงๆ ในทางภาษีอากรจะไม่ใช้บริษัทแม่ในประเทศไทย แต่เป็นบริษัทที่ตั้งอยู่ในประเทศดินแดนปลอดภาษี โดยบริษัทแม่ในประเทศไทยจะมีหน้าที่เสียภาษีเงินได้อีกครั้งก็ต่อเมื่อบริษัทในประเทศดินแดนปลอดภาษีได้นำผลกำไรจากการเข้าไปลงทุนในต่างประเทศมาจ่ายเป็นเงินปันผลให้แก่บริษัทแม่ในประเทศไทย

จากการศึกษาปรากฏว่า การที่บริษัทแม่ในประเทศไทยเข้าไปตั้งบริษัทในประเทศดินแดนปลอดภาษี เพื่อใช้เป็นผู้ดำเนินการลงทุนในประเทศต่างๆ แทนตนเอง จึงกลายเป็นรูปแบบที่นิยมใช้กันอย่างมากเพื่อเป็นช่องทางในการหลีกเลี่ยงภาระภาษีเงินได้ในประเทศไทย และหากบริษัทในประเทศดินแดน ปลอดภาษีได้ดำเนินการพักหรือเก็บกัก (“Deferral”) เงินได้ต่างๆ ไว้ ณ ประเทศดินแดนปลอดภาษีเป็นอย่างมากและเป็นเวลานาน สิ่งเหล่านี้จะส่งผลกระทบต่อประเทศไทยซึ่งเป็นประเทศที่บริษัทแม่ในประเทศไทยเป็นผู้มีถิ่นที่อยู่เนื่องจากทำให้ฐานรายได้เพื่อเรียกเก็บภาษีจากบริษัทแม่ในประเทศไทยลดน้อยลง

ดังนั้น ผู้เขียนจึงได้ศึกษามาตรการ Controlled Foreign Company (“CFC”) เป็นมาตรการเพื่อป้องกันการหลีกเลี่ยงภาษีระหว่างประเทศจากการพักหรือเก็บกักเงินได้ไว้ที่บริษัทในเครือซึ่งตั้งอยู่ในต่างประเทศ สาเหตุสำคัญของมาตรานี้คือการใช้อำนาจของกฎหมายภายในเพื่อเรียกเก็บภาษีสำหรับเงินได้ที่เก็บอยู่ภายนอกประเทศเสมือนหนึ่งว่าบริษัทที่ตั้งในต่างประเทศนั้นได้จ่ายเงินปันผลให้แก่บริษัทแม่ในประเทศไทยซึ่งเป็นผู้ถือหุ้นของบริษัทต่างประเทศแล้วนั่นเอง

นอกจากนี้ ผู้เขียนเห็นว่า มาตรการ CFC เป็นมาตรการที่ใช้อย่างแพร่หลายในประเทศต่างๆ เช่น สหรัฐอเมริกา อังกฤษ และประเทศสมาชิก OECD ในขณะที่ประมวลรัษฎากรของประเทศไทยไม่มีมาตรการป้องกันการหลีกเลี่ยงภาษีระหว่างประเทศในทำนองเดียวกับมาตรการ CFC ของหลายประเทศที่กล่าวมาข้างต้น ดังนั้น ปัญหาจึงเกิดขึ้นว่า ประเทศไทยสมควรจะนำมาตรการ CFC มาใช้เป็นหนึ่งในมาตรการป้องกันการหลีกเลี่ยงภาษีอากรระหว่างประเทศหรือไม่

คำสำคัญ: ภาษี,บริษัทที่ถูกควบคุมโดยบริษัทต่างชาติ, การกักเก็บภาษี, การกีดกันฐานภาษี, การหลีกเลี่ยงภาษี, บริษัทข้ามชาติ, บริษัทที่อยู่ห่างจากชายฝั่ง

Introduction

Nowadays, most of Thai companies who invest their business in the foreign countries often engage in Multinational Enterprise format and use a base company for tax and financial benefits including tax avoidance of Thailand where the residence country is located in.¹ Using the base company located in tax haven by the Thai company has a specific purpose

¹ ปฐมาภรณ์ นิติชัย, การลงทุนทางตรงในต่างประเทศของบริษัทจดทะเบียนไทย สถานะปัจจุบันและข้อเสนอแนะเชิงนโยบาย, เอกสารงานวิจัย ฉบับที่ 2 กุมภาพันธ์ 2554 (Patamaporn Nitichai, **Foreign Direct Investment of Thai Enterprises, Current status and Policy Suggestion**, Documentary Research Issue Feb. 2, 2011, at 16.

for the advantage of tax avoidance against the equality in taxation and also lead to unfairness in the legal system. These results in the fact that some taxpayers can get an opportunity from tax avoidance, and if any Multinational Enterprises avoid taxes by the same channel, this will cause serious damage to the national budget.² It also distorts the structure of the economy and destroys the competition system in international trade and investment as well as a capital flows between countries. Using tax base in tax haven country for avoiding income tax is an important problem on finding and having a legal measure against such act.³

As mentioned above, Thai law-makers and businesses must prepare themselves in several aspects for the AEC, particularly by amending laws and regulations on tax-related issues that have hindered the country's competitiveness on trade and investment.

This article, therefore, focuses on the study of the CFC rules are one of anti-tax avoidance measures which many countries recognize and adapt in their countries while The Thai Revenue Code still does not contain the anti-tax avoidance rules. As a result, the problem is raised whether Thailand should apply the CFC rules in order to prevent the tax avoidance and tax deferral and how to apply the CFC rules. The author, therefore, outlines the problems on collecting income tax as follows:

Problems on Collecting Income Tax

According to the study of the problems on collecting income tax, the elements of the important factors are as follows:

1. Base erosion and profit shifting (BEPS)

There are composed of a serious risk to tax revenues, tax sovereignty and tax fairness for both groups of OECD Member countries and Non-OECD Members countries alike. While domestic tax bases can be eroded and the government have lost many revenues. Significant sources of base erosion are profit shifting and tax deferral in zero or low tax rate jurisdictions.⁴

Currently, the problems of tax deferral, profit deferral and tax base erosion have been existing because it is difficult to transparently identify the right things.⁵ In addition to the foregoing the lack of information and the nature of the multinational companies' trans-border business transactions are obstacles to parent company established in other countries. Deferral provides an incentive to multinational corporations to keep foreign-sourced active

² สุเมธ ศิริคุนโชติ, กฎหมายภาษีอากรระหว่างประเทศ น. 153 (มหาวิทยาลัยธรรมศาสตร์ 2544) (Sumat Sirikunnachote, **International Tax Law** University 153 (Thammasat Publishing 2001).

³ International Economic Industry Organization, *ASEAN Economic Community Opportunity and Impact on Thai Industrial*, **International Economic Industry Organization**, March 15, 2011.

⁴ OECD, **Action Plan on Base Erosion and Profit Shifting**, OECD Publishing 8 (1st ed. 2013).

⁵ Price Waterhouse Cooper Ltd., **Base Erosion and Profit Shifting**, Impact on jersey, (2nd ed. 2013)

income offshore because corporate taxes are not due until the income is repatriated. Furthermore, deferral also provides an incentive to shift income to low-tax jurisdictions and to keep it there. Moreover, the profit deferral is a global problem because the impact of the tax laws and policies of one country can adversely affect another country's ability to collect tax that the government losing even more revenue and having a negative effect on the economy.⁶

2. Transfer pricing

The gigantic problem is to create an incentive to shift functions, assets and risks to where their returns are taxed more favorably. Many corporate tax structures focus on allocating significant risks and hard-to-value intangibles to low-tax jurisdictions, where their returns may benefit from a favorable tax regime. Such arrangements may result in or contribute to BEPS. Shifting income through transfer pricing arrangement related to the contractual allocation of risks and intangibles under the arm's length standard adopted by related parties. The evaluation of risk often involves in fact, a low-tax transferee of intangibles should be treated as having borne, on behalf of the MNE group, significant risks related to the development and use of the intangibles in commercial operations. Such controversies are lead to a cause of the ability of tax administrations to examine the substance of such arrangements such as the avoidance of inappropriate base erosion.⁷

There are a number of examples of risk allocations that can be undertaken under the arm's length principle between members of an affiliated group such as a low-risk manufacturing and distribution, contract R&D and captive insurance. Under each of models, the insurer could be located in a low-tax jurisdiction, and the service provider/insured located in a high-tax jurisdiction. A key challenge is determining the circumstances under which such arrangements result in or contribute to base erosion.⁸

3. Analysis of corporate tax structures

A critical observation in any analysis of corporate tax structures is the interaction of various principles and practices that the interaction of withholding tax rules in one country, the territorial taxation system in another country, and the entity characterization rules in a third country may combine to make it possible for certain transactions to occur in a way that gives rise to no current tax and have the effect of shifting income to a jurisdiction.⁹

In practice, any structure aimed at BEPS will need to incorporate a number of coordinated strategies, which often can be broken down into four elements:

⁶ OECD, **Tax Policy Studies Corporate Tax Incentives for Foreign Direct Investment**, OECD Committee on Fiscal Affairs, 40 (2001).

⁷ OECD, **Update: Base erosion and profit shifting** 26, OECD Publications, (1 st ed. 2013).

⁸ European Central Bank Working Paper Series No. 31, *The Disappearing Tax Base:*

Is Foreign Direct Investment Eroding Corporate Income Taxes, 7 October 2000,

<http://www.Imf.org/external/pubs/ft/wp/2000/wp00173.pdf>

⁹ OECD, *supra* note 8, at 29

1) Minimization of taxation in a foreign operating or source country (which is often a medium to high tax jurisdiction) either by shifting gross profits through trading structures or reducing net profit by maximizing deductions at the level of the payer;

2) Low or no withholding tax at source;

3) Low or no taxation at the level of the recipient (which can be achieved through low-tax jurisdictions, preferential regimes or hybrid mismatch arrangements) with entitlement to substantial non-routine profits often built up via intra-group arrangement; and

4) No current taxation of the low-taxed profits.

In conclusion, their overall effect is a tendency to associate more profit with legal constructs and intangible rights and obligations, and to legally shift risk intra-group, with the result of reducing the share of profits associated with substantive operations. While these corporate tax planning strategies may be technically legal and rely on carefully planned interactions of a variety of tax rules and principles, the overall effect of this type of tax planning is to erode the corporate tax base of many countries in a manner that is not intended by domestic policy. This implies that it may be very difficult for any single country, acting alone, to effectively combat BEPS behaviors.¹⁰

4. Use of tax havens for tax avoidance

According to the Harmful Tax Competition : An Emerging Global Issue 1998 of the OECD which studies the measures against the use of the tax haven, which affect the international consensus on the International Tax Avoidance and Evasion reports 1987 as it is difficult to give a definition for the tax haven, but also provides an overview of the tax haven that the land is not taxed or taxed at a lower rate by the collection of income tax evasion issues of all source including in the proposed country to resident in another country to avoid paying taxed to the country of their residence. These regions attract economic activity with financial and other services with the primary objective of 3 reasons: providing a place for storing the interests from investment, providing a place where you can gain that is just paper and conveniently with taxpayers. Particularly, service of the bank's high performance has retained the information and confidentiality of the inspection of the Revenue authorities of the country of residence.¹¹

The main characteristic of classical tax havens are described below

- (1) None or low taxes on all or certain types of income and capital;
- (2) Bank and commercial secrecy;
- (3) Lack of exchange controls;
- (4) Relative importance of banking;
- (5) Communications;
- (6) Tax treaties; and
- (7) Other aspect.

¹⁰ *Id.* at 34.

¹¹ OECD, **Harmful Tax Competition An Emerging Global Issue** 16, France: OECD Publications, (1988).

In summary, from study of the historical documents, Thai Tax Revenue Department has no specific rules to deal with the effective profit deferral and controlling/manipulating these multinational companies, tax authorities always use their own discretions and judgments which may create uncertainty, a lack of consistency and unfairness for all taxpayers. Consequently, the country would be damaged for the long run by the loophole of Thai Tax Revenue Code

Guideline for Dealing with Harmful Tax Practices in OECD

From the study of guideline for dealing with Harmful Tax Practices in OECD, the guidelines will be created under the auspices of the Committee to undertake an on-going evaluation of existing and proposed regimes in Member and Non-Member countries in order to prepare to intensify their co-operation to counter harmful tax practices from adopting practices constituting harmful tax competition by set out these recommendations into the following three categories:¹²

1. Recommendations concerning domestic legislation and practices: starting from various counteracting measures currently found in domestic laws and how to increase their effectiveness:

1.1 CFC rules or equivalent rules;

1.2 Restrictions on participation exemption and other systems of exemption foreign income;

1.3 Foreign information reporting rules;

1.4 Transfer pricing rules; and

1.5 Access to banking information for tax purposes.

2. Recommendations concerning tax treaties: dealing with the benefits of tax conventions do not unintentionally make policies constituting harmful tax competition more attractive or prevent the application of domestic counteracting measures:

2.1 More efficient use of exchanges of information;

2.2 The entitlement to treaty benefits;

2.3 The clarification of the status of domestic anti-abuse rules and doctrines in tax treaties; and

2.4 Tax treaties with tax havens countries.

3. Recommendations to intensify international co-operation: put forward new ways through which countries will be able to act collectively against harmful tax competition:

3.1 Develop and actively promote principles of good tax administration; and

3.2 Associating non-member countries with the recommendation.

In conclusion, Non-Member Countries outside the OECD should consider the serious impact and tax base distortion by the harmful tax practices in order to eliminate the harmful tax practices out of the economic exercise. To eliminate the harmful tax practices on a global basis, Non-Member Countries will coordinate and comply themselves with the 1998

¹² Ibid., 39.

Report on Harmful Tax Practices and prepare to accept the same obligations as the OECD members. In this way, Non-Member countries can become partners in the development of an international framework appropriate in an era of free-trade and liberalized financial markets.

Nevertheless, the OECD has addressed the issue of harmful tax competition in a report from 1998. In the report the OECD recommends countries to adopt Controlled Foreign Company (CFC) rules in order to counteract harmful tax competition. In addition, the CFC rules is to prevent erosion of the tax base in the parent company's resident country due to the fact that the parent company will try to transform themselves into foreign companies so as to take advantage of low tax rate and avoid domestic taxation on its foreign income simply way by interposing a foreign base company in a territory with a lower level of taxation to receive such income instead of remitting its income to parent company's resident country because resident country has a higher tax rate that it is not incentive to remitting foreign income.¹³

Adopting of CFC Rules in Foreign Countries

According to comparative study of the laws of the United State and Japan, both countries have the concrete rules of the main provision governing tax deferral payment as described below:

United States

The United States generally does not tax foreign business profits earned through a foreign subsidiary until the subsidiary repatriates those earnings through a dividend. This policy, known as "deferral", allows U.S. companies to compete in foreign markets on tax parity with their foreign competitors. In addition to promoting the competitiveness of U.S. companies abroad, however, deferral also creates an opportunity for avoiding U.S. taxes on inventory trading profits and other income which can be easily shifted to a foreign base company. One weapon that the IRS can use to attack such schemes is Code Sec. 482, which gives the IRS the authority to allocate income among domestic and foreign affiliates whenever an allocation is necessary to clearly reflect the income of each party. As a result, in 1962 Congress enacted Subpart F, which automatically denies deferral to certain types of tainted income earned through a foreign corporation.¹⁴

The U.S. CFC rules do not apply only to CFCs in designated jurisdictions. Because of the operation of certain exceptions to subpart F income, the U.S. CFC rules target CFCs in tax havens or in countries with low-tax regimes. A low-tax regime is effectively identified as one with an applicable tax rate which is less than 90% of the applicable U.S. tax rate. A designated jurisdiction approach is not followed.¹⁵

¹³ OECD, **Controlled Foreign Company Legislation** 10, Paris: Head of Publications Service, (1996).

¹⁴ Robert E. Meldman, Michael S. Schadewald and Robert J. Misy, Jr., **A practical guide to U.S. Taxation of International Transactions** 132-133 (3th ed. 2003).

¹⁵ OECD, **Tax Policy Studies Corporate Tax Incentives for Foreign Direct Investment**, OECD Committee on Fiscal Affairs, 30-31 (2001).

The U.S. CFC rules impose current tax on U.S. shareholders, as defined above, in respect of certain undistributed income of those corporations. Persons who do not rise to the level of a U.S. shareholder are not currently taxed on the undistributed tainted income of the CFC. Attribution rules apply to expand the group of U.S. residents which may be required to include income currently as a deemed dividend.

However, some people have not agreed on measure to protect a delay taxation by alleged that this measure will affect taxpayers in any domestic countries. The impact will vary and is not able to make fairness between taxpayers together. In addition, the provisions on the protection of the taxing statute delay still have a complex that will lead to the expenditure to enforce and comply with such provisions both the tax authorities and the taxpayers.¹⁶

It can be said that the CFC rules are accelerated taxation from U.S. shareholder of company income which are not residents in the U.S., Income of such companies shall be deemed to be the income of the shareholders directly. If any without this provision, the U.S. shareholders are taxable income earned through foreign companies in which they invest when foreign companies distributed dividends. If the foreign companies do not distribute dividends, shareholders are not taxable income to the U.S.¹⁷

Japan

The CFC Rules, originally established in 1978, were in need of revision to accommodate changes to modern business practices and corporate structures. The Reforms liberalized the tax rules by generally reducing Japanese companies' requirements to report the income of their controlled foreign companies. At the same time, however, the Japanese government instituted a tax regime involving the taxation of the passive income of many controlled foreign companies of Japanese parent companies, which could lead to greater levels of taxation.¹⁸

The 2009 Tax Reform included significant amendments to the Japanese tax haven (CFC) rules due to the introduction of the foreign dividend exclusion system; e.g. the timing to aggregate taxation for dividends and the mechanism to mitigate double taxation.

On March 24, 2010, the Japanese Diet amended Japan's income Tax Law and other laws including those that make up the CFC Rules (Reforms), based on the 2010 tax reform proposals issued by the tax commission portion of the Japanese Cabinet on December 22, 2009.¹⁹ There were also notable amendments, e.g. the reduction of the threshold rate and the introduction of the Passive Income Aggregate Tax Rule.

¹⁶ Shaw C., **Legal Problems in International Trade and Investment** 339, (1st ed. 2003).

¹⁷ Sara Anderson, "*CFC rules and double tax treaties article*," **The OECD and UN model tax conventions** (August 2006) at 13-14.

¹⁸ Yasutaka Nishikori, Tsuyoshi Ito, James Emerson, and Atsushi Mizushima, **EUROMONEY Handbooks, New developments in Japan's CFC rules: liberalisation, expansion and clarification**, 2010 at 50.

¹⁹ KPMG tax corporation, **Japanese tax haven (CFC) Rules**, August 10, 2010, at 2.

There are two pieces of legislation as well as anti-tax haven measures to combat tax avoidance by multinational enterprises as follows;

If Japan adopted a principle of “effective management or control” for the determination of corporate residence, it would be easier for the tax authority to treat a foreign subsidiary incorporated in a country with a low-tax regime in certain circumstances. To prevent capital flight, with a transfer of income to tax haven countries, a possible change in the doctrine for the test of corporate residence was an important theme of the Tax Commission as regards tax revisions, but there has been no change until now.²⁰ Under the current doctrine, a corporate residence is the location of the head office or main office of a corporation for tax purposes in Japan. Without statutory anti-tax haven measures, it is hard to extend the taxing right to any retained income of a foreign corporation with a legally independent status, unless a part of the income retained in tax havens is deemed to be “income derived from sources within Japan”. This is true even if the foreign corporation has a permanent establishment in Japan.²¹

The first legislation mentioned above is the transfer pricing tax system. Article 66-4 of the Special Tax Measures Law (STML) prescribes that transfer prices of assets sold or purchased, remunerations for personal services provided or compensation for other dealings between associated enterprises should be at arm’s length prices when the actual prices are more or less than the arm’s length prices, for the purpose of corporation tax. A foreign corporation with a permanent establishment in Japan is also subject to this rule. The term “associated enterprises” includes (a) a parent company and its subsidiary, where the parent company directly or indirectly owns half its shares; (b) brother or sister companies, where half of the respective shares are directly or indirectly owned by the same person; and (c) two companies, one of which is in substance controlled by the other in respect of personnel affairs, trade or business, and financial aid etc. For the purpose of the arm’s length price, a comparable uncontrolled price method, a resale price method, a cost plus method, and other method are used.

The second legislation afore-mentioned is anti-thin capitalization tax measures. Article 66-5 of the STML prescribes that excess of interest paid over the limit shall not be treated as an expense of the payer, where the beneficiary of the interest is a foreign corporation which directly or indirectly owns more than 50 per cent of the shares of a domestic corporation as the payer. The limit means the part of the interest paid which is equivalent to an amount corresponding to the part of the loan which is three times equity. When the excess of interest over the limit is denied as the expense of the payer, the denied amount is treated as a part of the distributed income of the payer, and as “interest” to have tax withheld at source, not as a “deemed dividend” of the beneficiary.²²

²⁰ Ibid., 10.

²¹ Dennis Campbell, **International Taxation of Low-Tax Transactions: High Tax Jurisdictions** 256-257, (2nd ed. 2008).

²² Anuschka Bakker, Belema Obuoforibo, **Transfer Pricing and Customs Valuation: Two worlds to Tax as One** 441, (4th ed. 2009).

Conclusion

According to the study of the problem of using the foreign base company for profit deferral, the author then is of the opinion that Thailand ought to bring the CFC rules to be ones of the anti-tax avoidance measures in Thailand. It should be noted that CFC rules have pros and cons as indicated above but if the Revenue Department would like to exercise the CFC rules cautiously to the extent of the appropriate enforcement, such as determining the nature of the taxable income or defining some exceptions of enforcement pursuant to the CFC rules in order to prevent CFC rules to become the unreasonable burden or the obstacle to Thai investors who would like to invest overseas along with the tax structure of Thailand. That is, the tax structure of Thailand has been adjusted to comply with the CFC rules (e.g. elimination of double taxation).

Therefore, Thailand should be applied the CFC rules as Royal Decree or Revenue Code in pursuant to solving the adversities Controlled Foreign Company in Thailand, by having the significant measures as follows;

1. Definition of Controlled Foreign Company under Control Rule should be amended in the following details:

In Thailand, the definition of the control rule is presumed to exist when the parent company owns, directly or indirectly, in aggregate in all levels through foreign base company, not less than 25 percent of the voting power of a corporation in a following manners;

- (1) The total combined voting power of all classes of stock of such corporation entitle to vote, not less than 25 percent of total stock;
- (2) The total of stock, directly or indirectly, in aggregate in all levels, holds stock not less than 25 percent of total capital;
- (3) The power to govern the financial and operating policies of the corporation under a statute or an agreement;
- (4) The power to appoint or remove the majority of the members of the board of directors or equivalent governing body where the foreign base company is controlled by that board or body; or
- (5) The power to control or supervise the operation and management of the foreign base company.

Nevertheless, it should be taken into account that, in Thailand, is owned or is considered as owned by Thai parent company on any day during the taxable year of such foreign base company.

2. Target Territory

There are 2 methods to justify that the company is located in the target country's status as CFC or not. For the target territory is composed of 2 different methods used to define are as follows; Transaction approach is focuses on the type of income distinguish between active income and passive income. On the contrary, Jurisdiction approach is focuses on where the foreign base company is situated on tax havens or low tax jurisdictions.

In this regard, Thailand should take into account of the objective of business that foreign base company is located in tax havens or low tax jurisdictions. if it have a real business operation and management in tax havens or low tax jurisdictions in normal trade activities for driving Thai economy for trade competition in foreign countries that is very important source of income. Therefore, Thailand should apply compatible with transaction approach.

3. Attributed Income

The attributed income can be classified into 2 types as follows; active income is derived from the real business operation or active business, and passive income is generally the most mobile form of income such as interest, royalty, rent dividend and capital gain, and is thus easily diverted to foreign base company in target territories in order to avoid or deferral domestic tax.

In Thailand, it should be considered the CFC's income have used in any manner. If the CFC derived the passive income, investment-type income or foreign base company income from the related parties which may be described generally as sales and services income in a particular country in circumstances which have not the reason for an economic or business justification for the CFC's establishment in tax havens countries, or if the income is used directly in the active business or normal trade of business such as the CFC have not remitted the income to parent company because the CFC shall collect the income in order to carrying out within the CFC for operated in respect of its main business. It conclude that the income should not be treated as passive income.

4. Related Party Transaction

Proceeding of the related parties will have the priority to the enforcement of the CFC rules, as required under the CFC rules should be taken into account the relevance business transactions of the parties.

For Thailand, if the parent company have a business transaction more than 50 % of revenue with the foreign base company that is a related parties in order that the foreign base company receive the sale income or service income instead of the parent company. For this case, such income should be owned or mostly owned by the parent company that should be calculated the corporate income tax under the CFC rules.

5. Computation of CFC's income

For the computation of CFC's income, CFC's income must be calculated for the taxation from the parent company who is resident in the countries enacted the CFC rules following the proportionate share as the shareholder's interest in the CFC.

In Thailand, there is no provision concerning the anti-tax avoidance measures. Thailand should adopt the concept of The United States law by clearly prescribing cap in the treatment of the computation of CFC's income. Moreover, the CFC's income can be marked as a currency to convert foreign currency following as the parent company's resident country into the local currency at the exchange rate on the day that the attributed income is repatriated to parent company in order to be easiest way at the end of fiscal year.

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